

the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from \$5 per hour to \$6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be \$285. The parties cannot, however, agree that the employee is to receive exactly \$285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeded 50 hours.

[46 FR 7316, Jan. 23, 1981]

**§ 778.327 Temporary or sporadic reduction in schedule.**

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his

straight time rate no matter how many hours he worked. If he set the rate at \$6 per hour for all workweeks in which the employee worked 40 hours or less, approximately \$5.93 per hour for workweeks of 41 hours, approximately \$5.86 for workweeks of 42 hours, approximately \$5.45 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime at these "rates") \$6 an hour regardless of the number of overtime hours worked. This is an obvious book-keeping device designed to avoid the payment of overtime compensation and is not in accord with the law. See *Walling v. Green Head Bit & Supply Co.*, 138 F. 2d 453. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonovertime week—in this case, \$6 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide \$6 rate usually working 50 hours and taking home \$330 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to \$7.65 for such weeks so that their total compensation is \$328.95 for a 42-hour week the question may properly be asked, when they return to the 50-hour week, whether the \$6 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra \$1.05 or is their "regular" rate really now \$7.65 an hour since this is what they earn in the short workweek? It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee—the longer he works the lower the rate—the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.

[46 FR 7317, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

**§ 778.328 Plan for gradual permanent reduction in schedule.**

In some cases, pursuant to a definite plan for the permanent reduction of the normal scheduled workweek from